NTSB Order No.
EM-66

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 5th day of January 1978,

OWEN W. SILER, Commandant, United States Coast Guard,

v.

RAFEL TORRES, Appellant.

Docket ME-66

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming revocation of his seaman's documents for misconduct aboard ship.[1] The charge and offenses found proved concern appellant's employment as an oiler on different dates aboard two United States merchant vessels, while acting under authority of his Merchant Mariner's Document (No. Z-951917-D2).

Appellants appeal to the Commandant (Appeal No. 2065) was from an initial decision issued by Administrative Law Judge Francis X. J. Coughlin after a full evidentiary hearing.[2] Throughout these proceedings appellant has been represented by counsel.

The law judge found that appellant wrongfully had possession of narcotic substances, consisting of marijuana and hashish, in his quarters aboard the SS BUCKEYE STATE on June 22, 1973, when this vessel was docked in Kandla, India; and that he wrongfully assaulted and battered a third assistant engineer aboard the SS EXPORT AGENT, while that vessel was at sea on April 11, 1974.

With respect to the first offense, it is undisputed that Indian customs officers boarded the BUCKEYE STATE to conduct a routine inspection; that appellant was taking a shower and had left the door to his cabin ajar; and that when he returned the officers

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[1] Board review of the Commandant's decision is authorized by 49 U.S.C. 1903(a)(9)(B).

[2]Copies of the decisions of the Commandant and the law judge are attached.

asked to search his cabin and he gave his consent. A packet containing 28 grams of marijuana and 50 grams of hashish was found in the pocket of appellant's trousers, which were hanging on a wall hook inside his room. Appellant testified that, for fear of being jailed, he then cooperated with the customs officers in their apprehension of a local narcotics peddler.[3] The customs officers thereafter permitted appellant to sail with his ship upon paying 150 rupees as a "personal penalty" under Indian law.

Concerning the second offense, the third engineer testified that appellant struck him in the face with the palm of his hand during an altercation. This is corroborated by the ship's log (Exhibit 3) which contains a full recital of the facts surrounding the assault and the ship's medical log which shows that the engineer was engineer was treated for a "...slight swelling and redness of right eye..." (Exhibit 9). The law judge found this evidence unrebutted by appellant's testimony to the effect that the blow was accidental. Although appellant's good prior record was considered, the law judge nevertheless determined that the offenses in this case were serious enough to warrant revocation.

In his brief on appeal, appellant contends that it was never established that the substances found in his trousers either belonged to him or were in his possession. He further contends that proof was lacking on the nature of the substances found. He also contended before the Commandant that the credibility of the victim of the assault was not properly assessed.[4] Counsel for the Commandant has not submitted a reply brief.[5]

Upon consideration of appellant's brief and the entire record, the Board concludes that the findings of the law judge are supported by substantial evidence of a reliable and probative

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[3] It appears that appellant served as a decoy in purchasing narcotics which led to the peddler's arrest. The record does not show that appellant had any prior dealing with that peddler.

[4]This issue will be considered, notwithstanding appellant's failure to raise it anew in his final brief, in order to deal with the entire case presented.

[5] The Commandant did, however, file a motion to dismiss the appeal as untimely filed. The motion is denied. Appellant's counsel has provided a satisfactory explanation for the delayed filing. His request for oral argument, however, is denied. 49 CFR 825.25(b).

character. However, we conclude that a 1-year suspension rather than revocation is an appropriate sanction and in accord with the circumstances of this case. In addition to our further findings herein and, except as modified with respect to sanction, we adopt the findings of the law judge and the Commandant, on review, as our own.

Appellant argues that the narcotics substances found in his trousers could have been placed there by the customs officers themselves, or by other unauthorized persons who were permitted to move freely about the ship. Appellant made no such assertions either during the customs inspection or upon being logged for the drug possession offense (Tr. 107-116, 127-133).[6] He left his cabin only a short time before the customs search,[7] providing little opportunity for anyone else to secret the drugs in his trousers. Appellant certainly was not a target of the search, since the customs officers were performing a general search for contraband throughout the ship. He testified that the officers were waiting when he returned from the shower and sought his consent before searching his room (Tr. 104). These circumstances provide no basis for inferring that there was a conspiratorial effort to entrap or frame the appellant. On the contrary, we find sufficient circumstantial evidence to establish appellant's possession of the drugs and negate any inference that these substances were "planted" on him by some other person or persons.

The nature of the substances found in his trousers was established by (1) the master's testimony that he had observed the substances in question and determined that they had the odor of and felt like substances that had been identified to him on other occasions as hashish and marijuana,[8] and (2) the Indian customs order which states that the customs inspectors identified the materials as such and which imposed a penalty on appellant for his possession of 50 grams of hashish and 28 grams of marijuana.

Appellant argues that no chemical analysis was performed on

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[6]Appellant's response to the log entry was "I don't say nothing." (Exhibit 2)

[7]The length of his absence was variously estimated by him as 6 or 10 minutes (Tr. 102).

[8] The master also testified that he had come in contact with such narcotics on previous occasions in his capacity as ship's master or officer and that he had taken a course given by his local police department in order to familiarize citizens with the nature of these narcotics.

the substances and that therefore no conclusive proof has been offered to establish that these materials were, in fact, the specific drugs alleged. Were this a case involving United States customs where the substances would have been within the jurisdiction of our government and available for testing we would expect such evidence to have been presented. However, in this case, the Indian customs authorities confiscated the drugs, thus making them unavailable for chemical analysis. Furthermore, even in criminal cases, the standard of proof does not always require expert identification or chemical analysis. "..[T]he existence of ...narcotics may be proved by circumstantial evidence; there need be no sample placed before the jury, nor need there be testimony by qualified chemists as long as the evidence furnished reasonable ground for inferring that the material in question was narcotics."[9] It follows that in a civil proceeding such as the instant case, chemical testing of the substances was not an essential element of proof, particularly in view of confiscation by a foreign government.

Appellant contends that the circumstances surrounding his assault and battery of the engineer on the EXPORT AGENT demonstrate that it was accidental and that the conflict in the testimony on this matter should have been resolved in his favor. Where, as here, the battery is consummated, "..[t]he necessary intent [to do bodily harm is] inferred...from violent conduct...."[10] It is undisputed that this battery occurred during an argument when appellant admittedly was excited and angry at the engineer. Furthermore, the blow was delivered with such force that the engineer was staggered and sustained injuries which required medical treatment. Such circumstances are sufficient, in our view, to negate any inference of an accidental occurrence. Consequently, we conclude that the necessary elements of appellant's assault and battery of the engineer were established.

The fact that this is appellant's first offense involving marijuana or a derivative drug such as hashish,[11] should be considered in the discretionary application of sanction pursuant to

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[9] United States v. Agueci, 310 F. 2d 817 (2nd Cir. 1962). See also United States v. Quesada, 512 F. 2d 1043 (5th Cir. 1975) and United States v. Gregorio, 497 F. 2d 1253 (4th Cir. 1974).

[10] 6A C.J.S. Assault and Battery §71. See also Commandant v. Reagan, Order EM-9, 1 N.T.S.B. 2193 (1970).

[11] Both are derived from the hemp plant (Cannabis sativa L.).

46 U.S.C. 239(g). [12] Since he has no prior disciplinary record with the Coast Guard (I.D. 13), and no other drug offense has been shown, we have determined that a 6-month suspension for the drug offense in this instance is appropriate. Inasmuch as the Commandant's regulations specifically provide for a 6-month suspension in this case of a first offense of assault and battery, [13] we have concluded that the revocation of appellant's document should be reduced to a 1-year suspension. Since appellant has effectively served 1 year of his sanction to date, it shall be terminated upon service of this order.[14]

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied except insofar as the modification of the Commandant's order is provided for herein;

2. The revocation order of the Commandant be and it hereby is modified to provide for a retroactive suspension of appellant's merchant mariner's document; and

3. The retroactive suspension, starting on November 18, 1976, shall terminate on the date of service appearing on the face of this order.

McADAMS, HOGUE, and KING, Members of the Board, concurred in the above opinion and order; BAILEY, Acting Chairman, concurred and dissented.

Acting Chairman Bailey Concurring and Dissenting:

I fully agree with the majority's findings on the merits. I must however depart from the reduction in sanction from revocation to a 1-year suspension.

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[12] Where, as here, the possessory offense is established by circumstantial rather than direct evidence and involves drugs which are neither narcotic nor addictive, we are less inclined to affirm the maximum statutory sanction of revocation.

[13] 46 CFR 5.20-165 (Group E of Scale of Average Orders).

[14] On November 18, 1977, appellant filed a toxicologist's report, used in another case, concerning various problems associated with chemical tests for marijuana and hashish. Appellant's counsel concedes that this document is untimely filed under §825.20 of the Board's rules of practice, 49 CFR 825.20. In any event, our decision is not based on evidence of chemical tests.

I believe that the majority has not complied with 46 CFR 5.03-4.[15] "The law judge did not find that the possession was experimental and that the use would not recur. It seems to me that the possession of 50 grams of hashish and 28 grams of marijuana is hardly indicative of a passing interest in drug use and revocation is therefore mandatory under section 5.03-4.

When a person is found to have committed a marijuana offense in the future, the law judge should automatically make a finding whether he believes that the use will or will not recur in order to compile a record upon which the requirements of section 5.03-4 can be decided.

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[15]Section 5.03-4 reads as follows:

> "5.03-4 Offenses for which revocation of licenses or documents is mandatory.
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> "Whenever a charge of misconduct by virtue of the possession, use, sale or association with narcotic drugs, including marijuana, or dangerous drugs is found proved, the administrative law judge shall enter an order revoking all licenses, certificates and documents held by such a person. However, in those cases involving marijuana, where the administrative law judge is satisfied that the use, possession or association was the result of experimentation by the person and that the person has submitted satisfactory evidence that such use will not recur, he may enter an order less than revocation.